95-817

(1)

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ROBERT SHERMAN ROBINSON, *Respondent,*

vs.

LARRY NORRIS, Director,
Arkansas Department of Correction, *Petitioner.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTION PRESENTED FOR REVIEW

DOES THE SIXTH AMENDMENT REQUIRE A STATE TO PROVIDE COUNSEL TO AN INDIGENT CONVICTED DEFENDANT TO RAISE CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN STATE PROCEDURE REQUIRES THAT SUCH CLAIMS BE RAISED BETWEEN CONVICTION AND DIRECT APPEAL?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW v

BASIS FOR JURISDICTION v

CONSTITUTIONAL PROVISIONS v

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT:

DOES THE SIXTH AMENDMENT REQUIRE A STATE TO PROVIDE COUNSEL TO AN INDIGENT CONVICTED DEFENDANT TO RAISE CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN STATE PROCEDURE REQUIRES THAT SUCH CLAIMS BE RAISED BETWEEN CONVICTION AND DIRECT APPEAL? 4

APPENDIX:

Slip Opinion in *Robinson v. Norris*, 60 F.3d 457 (8th Cir. 1995) A-1

Order Denying Rehearing in the Eighth Circuit A-6

Memorandum and Order of District Court A-7

Judgment of the District Court A-15

In re the Abolishment of Rule 37. and the Revision of Rule 36. of the Arkansas Rules of Criminal Procedure A-16

TABLE OF AUTHORITIES

CASES: Page

Chapman v. California,
386 U.S. 18 (1967) 7

Coleman v. Alabama,
399 U.S. 1 (1970) 6

Coleman v. Thompson,
501 U.S. 722 (1991) 5

Cravey v. State,
815 S.W.2d 933 (Ark. 1991) 5

Douglas v. California,
372 U.S. 353 (1963) 6

Johnson v. Lockhart,
944 F.2d 388 (8th Cir. 1991) 6

Murray v. Giarratano,
492 U.S. 1 (1989) 4

Nolan v. Armontrout,
973 F.2d 615 (8th Cir. 1992) 6

Pennsylvania v. Finley,
481 U.S. 551 (1987) 4

Robinson v. Norris,
60 F.3d 457 (8th Cir. 1995) 1, 7

United States v. Crowley,
529 F.2d 1066 (3d Cir. 1976), *cert. denied*,
425 U.S. 995 (1976) 6

Whitmore v. State,
771 S.W.2d 266 (Ark. 1989) 2

TABLE OF AUTHORITIES

TREATISES: Page

2 Wayne R. LaFave & J. Israel, Criminal Procedure § 11.2(b) (1984) 5

3 Wayne R. LaFave & J. Israel, Criminal Procedure § 26.6(d) (1984) 7

COURT RULES:

Arkansas Rules of Criminal Procedure 36.4 (1990).....5

MISCELLANEOUS:

In re the abolishment of Rule 37. & the revision of Rule 36. of the Arkansas Rules of Criminal Procedure, 770 S.W.2d 148 (Ark. 1989) 2

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit relevant to this petition is reported as *Robinson v. Norris*, 60 F.3d 457 (8th Cir. 1995) and is reprinted in the appendix to this petition. The Memorandum and Order and the Judgment of the United States District Court for the Eastern District of Arkansas relevant to this petition are not reported, but are reprinted in the appendix to this petition. The appendix also includes the Eighth Circuit's August 24, 1995 order denying petitioner Norris' petition for rehearing.

BASIS FOR JURISDICITON

The Eighth Circuit Court of Appeals entered its opinion in this case on July 13, 1995. Petitioner Norris petitioned for rehearing, which was denied by order dated August 24, 1995. Title 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review the judgment in question by writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shal enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. _____

ROBERT SHERMAN ROBINSON, *Respondent,*

vs.

LARRY NORRIS, Director,
Arkansas Department of Correction, *Petitioner.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a petition for writ of certiorari, brought by petitioner, Larry Norris, Director of the Arkansas Department of Correction, in which he asks this Court to review the decision of the United States Court of Appeals for the Eighth Circuit in the case of *Robinson v. Norris,* 60 F.3d 457 (8th Cir. 1995). In *Robinson,* the Eighth Circuit affirmed a judgment entered by the United States District Court for the Eastern District of Arkansas pursuant to 28 U.S.C. § 2254. The District Court conditionally granted the writ of habeas corpus to respondent Robinson, a prisoner in the Arkansas Department of Correction, on the basis that Robinson was not appointed counsel to prepare and file a motion alleging claims of ineffective assistance of trial counsel following his state court

convictions for theft, aggravated robbery and being a felon in possession of a firearm.

At the time of Robinson's conviction, the Arkansas Supreme Court had abolished Arkansas' former post-conviction remedy (provided by Ark. R. Crim. P. 37) in an effort to "limit or narrow postconviction relief." *Whitmore v. State*, 771 S.W.2d 266, 267 (Ark. 1989). In place of Rule 37, the Arkansas Supreme Court revised Arkansas Rule of Criminal Procedure 36.4 to provide a more limited postconviction remedy, effective beginning July 1, 1989. *See In re the abolishment of Rule 37. & the revision of Rule 36. Of the Arkansas Rules of Criminal Procedure*, 770 S.W.2d 148 (Ark. 1989) (a copy of which appears in the appendix to this petition). The limited remedy under Rule 36.4 permitted collateral attacks on a conviction on the basis of ineffective assistance of counsel only. *See id.* Prior to the change in postconviction procedure, an individual in Arkansas had three years in which to file claims of ineffective assistance under Rule 37. Pursuant to revised Rule 36.4, however, one was required to file a pro se motion for new trial asserting collateral claims of ineffective assistance within thirty days of the judgment of conviction. If the claims were viewed as meriting a hearing, new counsel was then to be appointed for the purpose of pursuing those claims at the hearing and on appeal and for handling the defendant's direct appeal. *See, e.g., id.*

Respondent Robinson was convicted while the revised Rule 36.4 was in effect. At the close of his trial, Robinson was advised of his right to file claims of ineffective assistance in the trial court pursuant to Rule 36.4, but he chose not to do so. After his direct appeal, Robinson filed the federal habeas corpus petition underlying this petition, where Robinson asserted that he was entitled to the appointment of counsel to prepare and file a motion alleging counsel ineffective, and that the trial court's failure to automatically appoint counsel for

him, without any request from Robinson, constituted a deprivation of Robinson's Sixth Amendment right to counsel. Without an evidentiary hearing, the District Court agreed, holding that Rule 36.4 represented a critical stage in the criminal proceeding against Robinson simply because the rule required that a motion alleging ineffective assistance be filed after trial but before direct appeal of one's conviction, while the right to appellate counsel still existed. The Eighth Circuit agreed, and both courts presumed prejudice to Robinson.

REASONS FOR GRANTING THE WRIT

It is well-settled in the law that states have no obligation to provide postconviction relief for collateral attack upon a judgment of conviction. *E.g., Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). If states choose to provide postconviction remedies, they possess "substantial discretion to develop and implement" them. *Id.* at 559. This case presents the question of whether a state's effort to streamline its postconviction review process by requiring that the process be initiated between trial and direct appeal results in the creation of a Sixth Amendment right to counsel to initiate the process, in spite of this Court's precedents which hold there is no Sixth Amendment right to counsel to pursue collateral remedies.

The Sixth Amendment does not require the appointment of counsel for the purpose of filing a collateral attack on one's judgment of conviction, no matter where the collateral attack falls in reference to trial or direct appeal. A number of this Court's decisions repeatedly have noted a distinction between direct and collateral attacks, and while the cases do not provide a specific definition for each term, they clearly indicate that the difference is not in the timing of the attacks (i.e., before or after direct appeal), but is in their substance.

For example, in *Murray v. Giarratano*, 492 U.S. 1 (1989), this Court noted that collateral attacks "serve a different and more limited purpose than either trial or appeal" — a clear indication that the difference between collateral and direct attacks is one of substance, not of timing. In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), this Court stated:

> Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that

> *normally* occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

Id. at 556-57 (citations omitted; emphasis added).

The implication of the quoted passage is that collateral attacks do not always *follow* direct appeals. And in *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court stated there is no right to counsel "in state collateral proceedings." *Id.* at 75. It cannot be more clear that Rule 36.4 permitted the presentation of collateral matters of ineffective assistance only. *See* Ark. R. Crim P. 36.4 (1990). In promulgating the rule, the Arkansas Supreme Court clearly intended it to be a civil, postconviction remedy. *E.g., Cravey v. Arkansas*, 815 S.W.2d 933, 935 (1991). Under Rule 36.4, one was required to file a pro se motion for new trial asserting collateral claims of ineffective assistance. If the claims were viewed as meriting a hearing, new counsel was to be appointed for the purpose of pursuing those claims. *See, e.g., id.* This procedure complied with constitutional requirements. *See* 2 Wayne R. LaFave & J. Israel, Criminal Procedure § 11.2(b) (1984).

> [*A*] *defendant is held not to have a right to appointed counsel to prepare a collateral attack petition*, but if a hearing is granted on that petition, then due process may necessitate appointment of counsel to ensure that the hearing is "fair and meaningful."
> *Id.* (emphasis added).

That Arkansas changed its rule regarding the timing of collateral attacks is of no consequence to the "right to counsel" issue. It defies logic to say that the very claims which did not

state a constitutional violation in *Coleman*, or in *Nolan v. Armontrout*, 973 F.2d 615 (8th Cir. 1992), or in *Johnson v. Lockhart*, 944 F.2d 388 (8th Cir. 1991) state a constitutional violation in Robinson's case simply because the time for raising those claims was changed pursuant to the state's "substantial discretion to develop and implement" a more limited postconviction procedure.

Furthermore, the District Court and Eighth Circuit presumed that the right to counsel, if indeed there is found to be one in this case, is a Sixth Amendment right akin to the right to counsel required for direct appeal. The right to counsel on direct appeal, however, is a due process right, not a Sixth Amendment right. *See, e.g., Douglas v. California*, 372 U.S. 353 (1963). Thus, any deprivation of counsel for collateral attack stands in a significantly different posture than does a deprivation of the right to counsel at trial, at least regarding the presumption of prejudice.

Even if a Sixth Amendment right, it is clear that not all violations of the Sixth Amendment right to counsel are within the automatic reversal category of cases. Rather, depending on the particular aspect of the right to counsel which is violated, the harmless error doctrine may be applicable. *See Coleman v. Alabama*, 399 U.S. 1, 11 (1970) (holding that the harmless error doctrine applies to the deprivation of counsel at a preliminary hearing); *United States v. Crowley*, 529 F.2d 1066, 1069-71 (3d Cir. 1976), *cert. denied*, 425 U.S. 995 (1976) (holding that the harmless error doctrine applies to the deprivation of counsel "post-trial" at a hearing on a motion to withdraw a guilty plea, in spite of the fact that the hearing was a critical stage in the proceedings because the role of counsel at such a hearing differs significantly from the role of counsel at trial).

Whether the violation of one's right to counsel is automatically prejudicial depends "upon the aspect of the

right that is violated." *See* 3 Wayne R. LaFave & J. Israel, Criminal Procedure § 26.6(d) (1984). Robinson's case concerns alleged ineffective representation, or lack of representation, in a collateral proceeding. Such a deprivation does not implicate the same concerns for which automatic reversal is warranted. For example, it does not have an "inherently indeterminate impact." *Id.* [discussing Justice Harlan's dissenting opinion in *Chapman v. California*, 386 U.S. 18 (1967)]. Rather, the ineffective assistance claims to be presented under Rule 36.4 can, and most likely will, be considered in federal habeas corpus proceedings, and the deprivation of counsel to file a Rule 36.4 motion clearly is not related to "the basic trial machinery." *Id.* For these reasons, a harmless error analysis must be applied to the deprivation of counsel in a collateral proceeding, if such a right exists at all, and the lower courts erred in presuming prejudice. Thus, petitioner Norris respectfully requests that this Court grant his application for the writ of certiorari and that this Court review the decision of the United States Court of Appeals for the Eighth Circuit in *Robinson v. Norris*, 60 F.3d 457 (1995).

Respectfully submitted,

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 94-2965

Robert Sherman Robinson,	★	
	★	
Appellee,	★	
	★	
v.	★	Appeal from the United
	★	States District Court for the
Larry Norris, Director,	★	Eastern District of Arkansas
Arkansas Department of	★	
Correction,	★	
	★	
Appellant.	★	

Submitted: February 15, 1995
Filed: July 13, 1995

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

McMILLIAN, Circuit Judge.

Larry Norris, director of the Arkansas Department of Corrections (hereinafter referred to as "the state"), appeals from a final order entered in the United States District Court[1] for the Eastern District of Arkansas, conditionally granting habeas corpus relief to petitioner Robert Robinson. For reversal, the state argues that the district court erred in concluding that Robinson's Sixth Amendment rights were violated by the denial of counsel to pursue a new trial motion under former Arkansas Rule of Criminal Procedure 36.4. For the reasons discussed below, we affirm.

[1]The Honorable John F. Forster, Jr., United States Magistrate Judge for the Eastern District of Arkansas.

I. BACKGROUND

On March 2, 1990, Robinson was convicted in Arkansas state court of theft, aggravated robbery, and unlawful possession of a firearm. After sentencing, the trial judge addressed Robinson personally and advised him that, if he was not satisfied with the services of his trial attorney, he could, pursuant to Arkansas Rule of Criminal Procedure 36.4,[2] file a motion for a new trial within thirty days alleging that his trial attorney had rendered ineffective assistance. Specifically, the state trial judge stated: "It is further my duty to advise you that if you're not satisfied with [your counsel's] services, you may file a *pro se* petition alleging such dissatisfaction within [thirty days]." Robinson did not pursue such relief. During the thirty-day period, Robinson continued to be represented by trial counsel. Trial counsel pursued a direct appeal in the Arkansas Supreme Court, and Robinson's conviction was affirmed. *See Robinson v. State*, 797 S.W.2d 425 (Ark. 1990). Robinson susequently filed a habeas corpus petition in federal district court pursuant to 28 U.S.C. § 2254. Among other grounds, he claimed he had been unconstitutionally deprived of counsel to pursue his motion for new trial under Rule 36.4. Relying on our court's decision in *Dawan v. Lockhart*, 980 F.2d 470 (8th Cir. 1992) (*Dawan*), the district court conditionally granted the writ on the grounds that the Rule 36.4 motion represented a

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[2]Between July 1, 1989, and January 1, 1991, the only means by which a person convicted of a crime could challenge the effectiveness of his defense counsel was through a motion for new trial pursuant to Ark. R. Crim. P. 36.4. That rule, which has now been replaced with a revised version of Ark. R. Crim. P. 37, provided in part that upon a guilty verdict:

> the trial judge must address the defendant personally and advise the defendant that if the defendant wishes to assert that his or her counsel was ineffective a motion for new trial stating ineffectiveness of counsel as a ground must be filed within thirty (30) days from the date of pronouncement of sentence and entry of judgment.

critical stage to which the constitutional right to counsel attaches and that Robinson had therefore been denied his Sixth Amendment right to counsel to pursue such motion. *Robinson v. Norris*, No. PB-C-93-640 (E.D. Ark. July 11, 1994) (Memorandum and Order).

II. DISCUSSION

This case requires us to revisit *Dawan*. In that case, Dawan, who had been convicted of burglary, assault, and theft of property in Arkansas state court, sought federal habeas corpus relief. Dawan raised an ineffectiveness-of-counsel claim alleging that his trial attorney had a conflict-of-interest that affected the way in which he conducted Dawan's defense. Dawan contended that his lawyer successively represented Stout, a co-defendant who pled guilty, and Dawan "on issues involving the same matter, the burglary, in which Dawan and Stout told contradictory stories about Dawan's participation." *Id.* at 472. Thus, Dawan asserted that his attorney's loyalty to the former client, Stout, had crippled his examination of Stout at Dawan's trial. *Id.* at 472-473.

In response to Dawan's habeas petition, the state argued that Dawan was procedurally barred because he had not raised his conflict-of-interest claim in the state courts in a motion for a new trial under Rule 36.4 or on direct appeal. Our court, however, found unreasonable the failure of Dawan's attorney to tell the state trial court of his conflict-of-interest and to request new counsel:

> This prejudiced Dawan by leaving him essentially unrepresented at the post-trial proceedings with respect to the conflict-of-interest question and denying him subsequent review of this issue. This ineffectiveness thus establishes the cause necessary to excuse Dawan's failure to raise the underlying conflict-of-interest question on motion for new trial and appeal.

Id. at 475. In a footnote, we noted that the Supreme Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991) (*Coleman*), which held there is no constitutional right to postconviction counsel, did not limit the right of effective trial counsel post-trial, "as distinct from postconviction." 980 F.2d at 474 n.5. We further stated that Dawan claimed "ineffectiveness of counsel in the post-trial and appellate phases of the case, rather than in postconviction collateral proceedings." *Id.* In the present case, the district court interpreted *Dawan* as holding that "Rule 36.4 was a post-trial remedy and that the petitioner had a constitutional right to effective assistance of counsel in Rule 36.4 proceedings." Slip op. at 4. Thus, the district court found that Robinson was deprived of his Sixth Amendment right to counsel to pursue an ineffective assistance claim in a motion for new trial under Rule 36.4.

The state argues that the district court incorrectly followed what the state characterizes as the dicta in *Dawan*. However, the state fails to recognize that in order to explain how another opinion from our circuit, *Simmons v. Lockhart*, 915 F.2d 372, 378 (8th Cir. 1990) (*Simmons*), applied to Dawan's case, we specifically stated that Dawan's claims related to post-trial and appellate phases, not postconviction collateral proceedings. *Dawan*, 980 F.2d at 474 n.5. *Simmons* involved the failure of counsel to preserve a conflict-of-interest issue in postconviction proceedings. Thus, the distinction was necessary to demonstrate *Simmons*'s applicability in light of the Supreme Court's decision in *Coleman*. Without the conclusion that Dawan's Rule 36.4 proceeding was post-trial, the *Simmons* decision would have been devoid of precedential value in *Coleman*'s wake. Thus, our conclusion in *Dawan* that the Rule 36.4 proceeding was post-trial is not dicta, which is defined as "words of an opinion entirely unnecessary for the decision of the case," BLACK'S LAW DICTIONARY 967 (5th ed. 1979), but rather essential to the court's reasoning. Therefore, the district court correctly followed the language in

Dawan holding a Rule 36.4 proceeding was a critical stage of Robinson's criminal proceedings.

Because a defendant is entitled to counsel under the Sixth Amendment in all such critical stages, *see Michigan v. Jackson*, 475 U.S. 625, 630-33 (1986), the district court correctly concluded that Robinson, who in no way waived his right to counsel, was denied his constitutional right to effective assistance of counsel when the state trial court informed him that he could file a *pro se* Rule 36.4 petition. Further, such actual denial of counsel is presumed prejudicial. *United States v. Cronic*, 466 U.S. 648, 659 (1984). The fact that Robinson continued to be represented by trial counsel throughout the thirty-day period for filing a Rule 36.4 motion is of no consequence. Robinson was entitled to separate counsel to pursue his ineffective assistance claim. *See Page v. United States*, 884 F.2d 300, 301 (7th Cir. 1989) (holding that counsel should not be expected to attack his own competence). Therefore, we hold that the district court did not err in concluding that Robinson's Sixth Amendment rights had been violated by the denial of separate counsel to pursue a Rule 36.4 motion.

III. CONCLUSION

For the reasons discussed above, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 94-2965EAPB

Robert Sherman Robinson,	★	
	★	
Appellee,	★	
	★	
v.	★	Order Denying Petition for
	★	Rehearing and Suggestion
Larry Norris, Director,	★	for Rehearing En Banc
Arkansas Department of	★	
Correction,	★	
	★	
Appellant.	★	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 24, 1995

Order Entered at the Direction of the Court:

/s/ Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

ROBERT SHERMAN ROBINSON, *Petitioner*

v. PB-C-93-640

LARRY NORRIS, Director,
Arkansas Department of Correction, *Respondent*

MEMORANDUM AND ORDER

Before the Court is the Petitioner's petition for writ of habeas corpus.

On March 2, 1990, a Pulaski County Circuit Court jury found Petitioner guilty of theft by receiving, aggravated robbery, theft of property, and being a felon in possession of a firearm. Petitioner was sentenced as an habitual offender with four prior felony convictions to consecutive sentences of thirty, eighty, thirty, and fifteen years respectively on each of the convictions. After the trial judge pronounced Petitioner's sentence, he informed Petitioner, pursuant to Ark. R. Crim. P. 36.4, that if Petitioner was not satisfied with the services of his appointed counsel[1] he could file a *pro se* petition alleging such dissatisfaction within thirty (30) days.[2] Petitioner did not

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[1]Howard Koopman.

[2]At the time of Petitioner's conviction and sentencing, Rule 36.4 allowed defendants to raise ineffective assistance of counsel claim by filing a motion for new trial within thirty (30) days from the date of pronouncement of sentence and entry of judgment. Under Rule 36.4, the trial judge was required to address the defendant personally and advise him that if he wished to file a motion for new trial alleging that counsel was ineffective, it had to be filed within thirty (30) days. The trial judge was further required to advise the defendant that, if a motion for a new trial was filed asserting facts sufficient to raise an

pursue Rule 36.4 relief. He did proceed with a direct appeal with the benefit of Koopman's services. On appeal, Petitioner alleged that the trial court erred by treating his prior convictions of robbery and theft of property as two convictions for the purposes of sentence enhancement because the theft occurred in the course of the robbery. The Arkansas Supreme Court found that his contention had no merit and affirmed his convictions. *Robinson v. State*, 303 Ark. 351, 797 S.W.2d 425 (1990). The Supreme Court issued a mandate on November 2, 1990.

In his current habeas corpus petition, Petitioner contends that he was denied counsel for the purpose of filing a motion for new trial pursuant to Rule 36.4, that Rule 36.4 was a critical stage of his trial, and that he, therefore, is entitled to habeas relief. He also contends that counsel was ineffective at trial and that the trial court erred by treating his prior convictions of robbery and theft of property as two convictions for the purposes of sentence enhancement because the theft occurred in the course of the robbery.

It is well-established that the Sixth Amendment to the United States Constitution ensures a defendant the right to counsel in all "critical stages" of the criminal proceedings

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[2] continued
issue whether his counsel was ineffective, a hearing would be held, and the time for filing a notice of appeal would not expire until thirty (30) days after the disposition of the motion, as provided in Rule 36.22.

Rule 36.4 was in effect from July 1, 1989, until December 31, 1990. *In the Matter of the Abolishment of Rule 37 and the Revision of Rule 36 of the Arkansas Rules of Criminal Procedure*, 299 Ark. 573, 770 S.W.2d 148 (1989). Rule 37, which was the remedy to assert ineffective assistance of counsel prior to Rule 36.4, was reinstated as of January 1, 1991. *In the Matter of Reinstatement of Rule 37 of the Arkansas Rules of Criminal Procedure*, 303 Ark. 746, 797 S.W.2d 458 (1990).

against him.[3] *Michigan v. Jackson*, 475 U.S. 625, 630-33, 106 S.Ct. 1404, 1407-09 (1986). A critical stage is any stage of the prosecution implicating substantial rights of the accused. *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S.Ct. 254, 256 (1967).

The United States Supreme Court has held that there is no constitutional right to an attorney in state post-conviction proceedings and that, consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2566 (1991). In *Dawan v. Lockhart*, 980 F.2d 470, 474 n.5 (8th Cir. 1992), the Eighth Circuit distinguished *Coleman*, holding that *Coleman* did not limit the right of effective assistance of counsel post-trial, as distinct from post-conviction. The Eighth Circuit concluded that Rule 36.4 was a post-trial remedy and that the petitioner had a constitutional right to effective assistance of counsel in Rule 36.4 proceedings. In so holding, the Court necessarily had to conclude that Rule 36.4 proceedings were a critical stage in the prosecution against petitioner and that petitioner, therefore, had a constitutional right to counsel in Rule 36.4 proceedings. *See Coleman*, 111 S.Ct. at 2566.

The Respondent contends that *Dawan* was wrongly decided. There is persuasive authority for Respondent's position. In concluding that Rule 36.4 was a post-trial remedy, the Eighth Circuit declined to mention that the Arkansas Supreme Court, which promulgated the rule, considered Rule 36.4 to be a civil, post-conviction remedy. *Cravey v. State*, 306

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[3]The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Ark. 487, 490, 815 S.W.2d 933, 935 (1991)[4]; *Fox v. State*, 309 Ark. 619, 620, 832 S.W.2d 244, 245 (1992); *Burk v. State*, 313 Ark. 652, 856 S.W.2d 14 (1993). In addition, ineffective assistance of counsel, the ground for relief under Rule 36.4, is traditionally a post-conviction or collateral ground for relief, and the most common ground for relief asserted by petitioners under Rule 37 as it existed prior to the promulgation of Rule 36.4 and under the current version of Rule 37. The fact that the remedy under Rule 36.4 had to be asserted within thirty (30) days of the date of pronouncement of sentence and entry of judgment rather than, as Rule 37 currently provides, within sixty (60) days of the date the appellate mandate was issued if the case was appealed (or within ninety (90) days of entry of judgment where no appeal was taken), arguably should not be the pivotal factor in determining whether Rule 36.4 proceedings are a critical stage of the criminal proceedings against a defendant. Furthermore, the First Circuit has held that a federally convicted defendant is not entitled, under the Criminal Justice Act, 18 U.S.C. § 3006A, or the Sixth Amendment, to appointment of counsel on a motion for new trial. *United States v. Tajeddini*, 945 F.2d 458, 469-470 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3009 (1992) (citing

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[4]In *Cravey*, the Arkansas Supreme Court held that a defendant has no constitutional right to counsel to assist him in preparing a motion for new trial pursuant to Rule 36.4. *Cravey*, 306 Ark. at 490, 815 S.W.2d at 935. The Court also held that where a hearing is required under Rule 36.4 due to a trial court's finding of sufficient facts alleged, appointment of counsel is "necessary." *Id.* However, the Court did not hold that counsel was constitutionally required. The rules with regard to appointment of counsel announced in *Cravey* are consistent with the rules for appointment of counsel under Rule 37. Under Rule 37, a petitioner has no constitutional right to appointment of counsel in preparing the petition. *Robinson v. State*, 295 Ark. 693, 700, 751 S.W.2d 335, 339 (1988). However, Ark. R. Crim. P. 37.3 provides for appointment of counsel by the circuit court where a hearing is granted and petitioner is unable to afford counsel. *Id.*

United States v. Lee, 513 F.2d 423 (D.C. Cir.), *cert. denied*, 423 U.S. 916 (1975), and *United States v. Birell*, 482 F.2d 890, 892 (2d Cir. 1973)).

Notwithstanding compelling authority to the contrary, this Court is obliged to follow *Dawan*. There is support for the holding in *Dawan* that a defendant is entitled to counsel in pursuing Rule 36.4 relief. The Arkansas Supreme Court, citing *Douglas v. State of California*, 372 U.S. 353, 83 S.Ct. 814 (1963), has indicated that the constitutional right to counsel does not end until the direct appeal of the original criminal trial is completed.[5] *Fretwell v. State*, 290 Ark. 221, 222, 718 S.W.2d 109, 110 (1986). In addition, the Fifth, Ninth, and Seventh Circuits have held that a motion for new trial is a critical stage of the prosecution and that a defendant is therefore entitled to counsel in pursuing such a motion. *Bland v. Alabama*, 356 F.2d 8, 15-16 (5th Cir.), *cert. denied*, 383 U.S. 947 (1966); *Menefield v. Borg*, 881 F.2d 696, 698-699 (9th Cir. 1989); *Johnston v. Mizell*, 912 F.2d 172, 175-176 (7th Cir. 1990), *cert. denied*, 498 U.S. 1094 (1991). *See also King v. State*, 613 So.2d 888, 890-891 (Ala. Crim. App. 1993); *Adams v. State*, 199 Ga.App. 541, 543, 405 S.E.2d 537, 539 (1991).

The Court finds that Rule 36.4 proceedings were a "critical stage" in the criminal proceedings against Petitioner

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[5]The Court notes that under Ark. R. Crim. P. 36.26, trial counsel must represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted to withdraw, in the interest of justice or for other sufficient cause, by the trial court or the Arkansas Supreme Court. The Court acknowledges that Petitioner's attorney, who represented petitioner at trial and on appeal, could not have ethically represented Petitioner in Rule 36.4 proceedings since the ineffectiveness of trial counsel would have been at issue in such proceedings. The Arkansas Supreme Court, in promulgating Rule 36.4 without indicating the role of counsel in such proceedings, simply did not harmonize the rule with Rule 36.26.

and that he was entitled to counsel in pursuing Rule 36.4 relief. The right to counsel does not depend upon a request for counsel, and it is readily apparent from the record that Petitioner did not waive his right to counsel.[6] *Michigan v. Jackson*, 475 U.S. at 633 n.6, 106 S.Ct. at 1409 n.6. Actual denial of counsel at a critical stage of a defendant's trial is legally presumed to be prejudicial and is constitutional error. *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047 (1984); *Penson v. Ohio*, 488 U.S. 75, 88, 109 S.Ct. 346, 354 (1988). *See also Smith v. Lockhart*, 923 F.2d 1314, 1321-1322 (8th Cir. 1991). Actual denial of counsel can never be treated as harmless error. *Penson*, 488 U.S. at 88, 109 S.Ct. at 354. Under the circumstances, the Magistrate Judge concludes that Petitioner's Sixth Amendment right to counsel was violated.[7]

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[6]In fact, Petitioner had appointed counsel (his trial attorney) during the time for requesting Rule 36.4 relief since counsel had not been permitted to withdraw and thus was required to represent Petitioner through his direct appeal pursuant to Rule 36.26. To protect Petitioner's constitutional right to counsel at a critical stage of the proceedings against him, the trial court and appointed counsel should have made sure that Petitioner had parallel counsel to assist and advise Petitioner in the determination of whether to pursue Rule 36.4 relief and to represent Petitioner in all Rule 36.4 proceedings, including the preparing and filing of the petition. *See United States v. Turnbull*, 888 F.2d 636, 638 (9th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990) (stating that "[i]f an accused does not knowingly and voluntarily waive counsel, and does not retain acceptable counsel, the court must appoint counsel"); *Pall v. State*, 632 So.2d 1084, 1085 (Fla. Dist. Ct. App. 1994).

[7]The Court notes that Respondent contends that Petitioner's claim that he was deprived of counsel in Rule 36.4 proceedings is procedurally barred. The Respondent, citing *Fox v. State*, 309 Ark. 619, 832 S.W.2d 244 (1992), asserts that Petitioner could have filed a Rule 37 petition within ninety (90) days of January 1, 1991, the date that Rule 37 was reinstated. In *Fox*, the Arkansas Supreme Court held that where a petitioner pled guilty while Rule 37 was not in effect and the trial court failed to advise him of the provisions of Rule 36.4, he could file a petition pursuant to Rule 37, provided he filed the petition within ninety (90) days of January 1, 1991. *Fox*, 309 Ark.

In conclusion, the Court finds that Petitioner was deprived of his Sixth Amendment right to counsel in pursuing his motion for new trial pursuant to Rule 36.4. The Court orders that a writ of habeas corpus shall issue unless, within ninety (90) days, Petitioner is allowed to prosecute, with the

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[7] continued
at 621, 832 S.W.2d at 246. The Court finds that *Fox* only applies to pleas of guilty. The Arkansas Supreme Court has applied a different rule with respect to convictions resulting from a trial after a plea of not guilty. The Court has held that where a petitioner was convicted after entering a plea of not guilty, the conviction was had during the time that Rule 36.4 was in effect, and the appellate mandate was issued after January 1, 1991, he could file a petition pursuant to Rule 37 within sixty days of the date the appellate mandate was issued. *Pogue v. State*, 316 Ark. 428, 430-431, 872 S.W.2d 387, 388 (1994). *See also Prince v. State*, 315 Ark. 492, 493, 868 S.W.2d 77, 78 (1994), *rehearing denied, Prince v. State*, CR 93-1020 (February 14, 1994).

Petitioner was convicted on March 2, 1990, after a jury trial. The Arkansas Supreme Court affirmed his convictions on October 15, 1990. The appellate mandate was issued on November 2, 1990, fifty-nine days prior to the date that Rule 37 was reinstated. Accordingly, the remedy announced in *Pogue* and *Prince* was not available to Petitioner.

The Court further finds that the new rules announced in *Fox*, *Pogue*, and *Prince* do not preclude review by this Court of petitioner's claim since the Arkansas Supreme Court did not announce the rules until well after Petitioner's time for filing a Rule 37 petition, under the Arkansas Supreme Court's new procedural rules, had expired. *See Michel v. Louisiana*, 350 U.S. 91, 93 (1955); *Williams v. Lockhart*, 873 F.2d 1129, 1131-32 (8th Cir.), *cert. denied*, 493 U.S. 942 (1989); *Spencer v. Zant*, 715 F.2d 1562, 1571 (11th Cir. 1983); *Ford v. Georgia*, 498 U.S. 411, 424-425, 111 S.Ct. 850, 857-858 (1991); *Thomas v. Goldsmith*, 979 F.2d 746, 750 (9th Cir. 1992); *Warner v. United States*, 975 F.2d 1207, 1213-1214 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 1314 (1993).

In summary, the Court finds that there was no reasonably available state remedy by which Petitioner could raise his claim that he was deprived of counsel in Rule 36.4 proceedings. Under the circumstances, his claim that he was deprived of counsel in Rule 36.4 proceedings is not procedurally barred.

benefit of counsel, Rule 36.4 proceedings in Pulaski County Circuit Court and an appeal to the Arkansas Supreme Court, if desired. *See United States v. Rundle*, 244 F.Supp. 894 (E.D. Penn. 1965); *King v. State*, 613 So.2d at 892.

THEREFORE, the Court finds that a writ of habeas corpus shall issue unless, within ninety (90) days, Petitioner is allowed to prosecute, with the benefit of counsel, Rule 36.4 proceedings in Pulaski County Circuit Court and an appeal to the Arkansas Supreme Court, if desired.

IT IS SO ORDERED this 11th day of July, 1994.

/s/ United States Magistrate Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 7-12-94

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

ROBERT SHERMAN ROBINSON, *Petitioner*

v. PB-C-93-640

LARRY NORRIS, Director,
Arkansas Department of Correction, *Respondent*

JUDGMENT

Pursuant to the Memorandum and Order filed in this matter on this date, it is Considered, Ordered, and Adjudged that a writ of habeas corpus shall issue unless, within ninety (90) days, Petitioner is allowed to prosecute, with the benefit of counsel, Rule 36.4 proceedings in Pulaski County Circuit Court and an appeal to the Arkansas Supreme Court, if desired.

IT IS SO ORDERED this 11th day of July, 1994.

/s/ United States Magistrate Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 7-12-94

IN THE MATTER OF THE ABOLISHMENT OF RULE 37. AND THE REVISION OF RULE 36. OF THE ARKANSAS RULES OF CRIMINAL PROCEDURE

770 S.W.2d 148

Supreme Court of Arkansas
Delivered May 30, 1989

PER CURIAM. Rule 37. of the Arkansas Rules of Criminal Procedure is abolished effective July 1, 1989, however, persons who have been convicted and sentenced during the time the rule was in effect may proceed in accordance with the rule as it existed prior to that date.

Rule 36.4. is amended effective July 1, 1989, by addig the following paragraph:

> The trial judge must address the defendant personally and advise the defendant that if the defendant wishes to assert that his or her counsel was ineffective a motion for a new trial stating ineffectiveness of counsel as a ground must be filed within thirty (30) days from the date of pronouncement of sentence and entry of judgment. The juge must further advise the defendant that, if a motion for a new trial is filed asserting facts sufficient to raise an issue whether his or her counsel was ineffective, a hearing will be held, and the time for filing a notice of appeal will not expire until thirty (30) days after the disposition of the motion, as provided in Rule 36.22.